

Fifthly, in the case of a lease at a progressive rent the English Act provides a method for ascertaining the standard rent; in certain cases the maximum rent payable under the lease is to be taken to be the standard rent. In the Ordinance no such provision can be found; it would be impossible to say which of the graduated sums is to be taken to be the standard rent in the Colony. All these considerations lead me to the conclusion that the case of *Woozley v. Woodall Smith, supra*, is of very little assistance in the decision of the present case.

In my opinion, upon a true construction of the definition of "standard rent" in the Ordinance, the rent of the premises in the present case as at the 1st day of August 1939 was \$500 per mensem. It follows, therefore, in my judgment, that the standard rent of the premises is \$500 per mensem. Applying the provisions of section 3 (1) to the facts of the case it is clear that the first defendant company have received as rent certain sums of money in excess of the amount which they could lawfully receive, being sums in excess of the standard rent of \$500 per mensem.

It was contended by counsel for the first defendant company that in any event his clients were entitled to the twenty-five per cent increase of rent under section 7 (1) (c) of the Ordinance. Such an increase can be lawfully received only when a new tenancy at an increased rental has been created. And, before the new tenancy can be created, the existing tenancy must be determined according to law. As there is no evidence that the existing tenancy in this case has been determined, the first defendant company cannot, in my opinion, avail themselves of the provisions of section 7 (1) (c) of the Ordinance.

There is one further submission to be dealt with. It was submitted by counsel for the defendants that by reason of the enactment of Ordinance No. 35 of 1939 the contract of lease was frustrated. In my opinion the short answer to this argument is that by enacting Ordinance No. 30 of 1941, which brought in the proviso to section 6 (1) of Ordinance No. 35 of 1939, the legislature was recognising the efficacy of written tenancy agreements or leases executed before the 1st August 1939 which provided for periodical or progressive increases of rent. It is therefore, in my opinion, impossible to say that the contract of lease in this case was frustrated.

It has been laid down that the granting of a declaration is a matter of discretion. In my

A opinion this is a clear case for the exercise of the Court's discretion in favour of the plaintiff company. There will therefore be a declaration as prayed in the statement of claim. The first defendant company will refund to the plaintiff company all sums which they have received in excess of the standard rent subject to the claim to a portion of such sums being barred by the Limitation Ordinance.

B It should be stated that counterclaims were filed by the first defendant company and the second defendant. These counterclaims were not proceeded with and they are accordingly dismissed.

C As to the costs of both the claim and counterclaim, the first defendant company will pay the plaintiff company's costs out of the estate of Tan Tye deceased, while the second defendant will pay to the plaintiff company such costs as have been occasioned by his having been joined as a party to the action. The first defendant company's costs will be paid out of the estate of Tan Tye deceased, while the second defendant will bear his own costs.

E Order accordingly.

Solicitors: Donaldson & Burkinshaw;
Rodyk & Davidson; Hilborne & Co.

F MUNAH BINTI ALI v. PUBLIC PROSECUTOR

[C. A. (Thomson C.J., Whyatt C.J. (S) and Good J.)
March 14, 1958]

[Ipoh — F.M. Criminal Reference No. 4 of 1957]

G Penal Code ss.312 and 511 — Attempt to cause miscarriage — Whether necessary for Court to be satisfied that the woman is with child before the Court proceeds to convict.

H The question for decision in this reference was whether in a charge of attempting to cause a woman to have a miscarriage contrary to sections 312 and 511 of the Penal Code it was necessary for the Court to be satisfied that the woman was with child before the Court proceeded to convict.

I Held (Whyatt C.J. (S) and Good J., Thomson C.J. dissenting): in a charge of attempting to cause a woman to have a miscarriage it is not necessary for the Court to be satisfied that the woman is with child before the Court proceeds to convict.

Observations on "attempt" to commit an offence.

Cases referred to:—

- (1) *R. v. Rings & Ors.*, 17 Cox C.C. 491.
- (2) *R. v. Collins*, 9 Cox C.C. 497; *L. & C.* 471, 475.

- (3) *R. v. Percy Dalton*, 33 Cr. App. R. 110.
- (4) *R. v. Mangesh Jiva'ji*, I.L.R. 11 Bom. 376.
- (5) *R. v. Whitchurch*, 24 Q.B.D. 420.
- (6) *Lamont v. Strathearn*, (1933) J.C. 33.
- (7) *Peggy Anderson*, (1928) J.C. 1.
- (8) *Semple*, (1937) J.C. 41.
- (9) *Asgaralli Pradhanin v. R.*, I.L.R. 61 Cal. 54.
- (10) *R. v. Brown*, 10 Q.B.D. 381.
- (11) *R. v. Scudder*, 172 E.R. 565.
- (12) *R. v. Luzman Naryan Joshi*, (1899) 2 Bom.L.R. 286.
- (13) *R. v. Vinayek Narayen Bhatye*, (1899) 2 Bom.L.R. 304.

CRIMINAL REFERENCE TO THE COURT OF APPEAL.

Appellant in person.

Abdul Kadir bin Yusof (Federal Counsel) for the respondent.

Thomson C.J.:—This was an appeal from a decision of the Sessions Court at Ipoh which came before us for rehearing by reason of the Judge before whom it came originally having granted a certificate under section 34 of the Courts Ordinance.

The appellant was originally charged with the following charge:—

"That you on 19.10.56 at about 3.00 p.m. at No. J. 60, Lorong Silibin, Ipoh in the State of Perak voluntarily caused one Female Chinese named Chee Yew Cheng then being with child to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said Chee Yew Cheng, and thereby committed an offence punishable under section 312 of Penal Code."

At the close of the case for the prosecution the learned President was satisfied that there was evidence to show that the accused had used an instrument on the woman mentioned in the charge and in consequence had caused her some time later to suffer a substantial haemorrhage. He was not, however, satisfied that there was evidence to show that the woman was pregnant when the instrument was used upon her or that the haemorrhage contained products of conception. He accordingly framed a new charge in the following terms:—

"That you on or about 19.10.56 at No. J 60, Lorong Silibin, Ipoh voluntarily attempted to cause one Chee Yew Cheng to have a miscarriage and in such attempt did an act to wit inserting an instrument into her vagina

A and thereby committed an offence punishable under section 312 and section 511 Penal Code."

The trial proceeded on the new charge and in the event the appellant was convicted on it and sentenced to three months' imprisonment.

B Against that conviction and sentence the appellant appealed and in due course her appeal came on for hearing before Shepherd, J. He allowed the appeal on the ground that the prosecution had failed to prove that the woman was with child. Some time later, however, His Lordship had doubts as to the correctness of his decision and accordingly of his own motion gave a certificate under section 34 of the Courts Ordinance that the determination of the appeal involved a point which it was desirable in the public interest to have determined by the Court of Appeal.

D In consequence the appeal came before this Court for rehearing at Ipoh on 24th February last and was dismissed by a majority.

My own views on the point involved can be stated very shortly.

E Section 312 of the Penal Code reads as follows:—

F "Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

G The only observation I would make regarding that section is that it is quite clear that the expression "causes a woman with child to miscarry" means to cause her to lose from the womb prematurely the products of conception and that therefore there can be no offence under the section unless there are products of conception. To cause a woman who is not pregnant to suffer a haemorrhage may or may not be an offence under some other section of the Code (I express no opinion on the point), it is certainly not an offence under this section unless the haemorrhage contains products of conception.

H The question of attempts to commit offences is dealt with by section 511 of the Penal Code, the material portions of which read as follows:

"Whoever attempts to commit an offence punishable by this Code or by any other written law . . . and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case

may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence:

ILLUSTRATIONS.

(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket; A is guilty under this section."

The argument for the prosecution here was that what the present appellant did was punishable as an offence by reason of the provisions of this section. It was said that there was a very close analogy between the illustrations appended to the section and the facts of the present case. These illustrations are of course based upon the English case of *Reg. v. Ring & Ors.*⁽¹⁾ where it was held, for reasons which were not stated, that it was wrongly decided in *Reg. v. Collins*⁽²⁾ that an attempt at felony could not be committed by a person putting his hand into another's pocket for the purpose of committing a felony, there being at the time nothing in the pocket.

The analogy between the present case and the illustrations to section 511 is attractive. An analogy, however, is not an argument and in any event this analogy is a bad one. There may be a notional similarity between attempting to remove a non-existent coin from a woman's handbag and attempting to remove non-existent products of conception from her womb. But there is all the difference in the world between something which is in fact impossible but which if possible would be an offence and something which cannot possibly be an offence in any circumstance whatsoever.

It will be observed that section 511 does not define an attempt. It only states what attempts are themselves offences. It says in effect that before an attempt is itself an offence it must satisfy two conditions. The first of these is that it must be an attempt to commit an offence punishable by the Code or by any other written law. The other is that there must be an act towards the commission of the offence.

In other words, before an offence is punishable it must be an attempt to do something which is an offence punishable under the Code or some other written law. It follows that an attempt to do something which is not an offence

A is not punishable. As was said by Birkett, J., in the case of *Percy Dalton*⁽³⁾ :—

"Steps on the way to the doing of something, which is thereafter done, and which is no crime, cannot be regarded as attempts to commit a crime."

B The present case seems to come fairly and squarely within these words. What the appellant did was to pass an instrument and thereby cause the woman in the case to have a haemorrhage but did not amount to causing her to miscarry because she was not with child.

C The matter was dealt with in much the same way in the case of the *Queen Empress v. Mungesh Jiva'ji*⁽⁴⁾ in which the facts were strikingly similar to those in the present case. The accused was charged with criminal intimidation in contravention of section 507 of the Code, the allegation against him being that he had sent a letter to the Revenue Commissioner containing a threat that if a certain forest officer who was said to be a person in whom the Commissioner was interested was not removed elsewhere he would be killed. The Sessions Judge found that the letter was in fact sent but that the forest officer was not a person in whom the Commissioner was interested. He accordingly acquitted the accused of the offence of criminal intimidation but convicted him of an attempt to commit that offence. The conviction was quashed and Birdwood, J., in the course of his judgment made the following observations (at page 381):—

"It appears, therefore, that the act intended and done by the accused lacked an essential element of the offence of committing criminal intimidation But it does not follow that the accused could still be legally convicted of an attempt to commit that offence. It is possible to attempt to commit an impossible theft, and so offend against the Code, because there is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code. But no criminal liability can be incurred under the Code by an attempt to do an act, which, if done, would not be an offence against the Code. In the present case, therefore, if the accused was not guilty of committing criminal intimidation, because the act intended and done by him lacked an ingredient of that offence, he could not be guilty of the attempt of which he has been convicted."

I I would add that there would appear to be no English case directly bearing on the point although in the case of the *Queen v. Whitechurch*⁽⁵⁾ Lord Coleridge, C.J., expressed doubt as to whether a woman who was not in fact with child could be indicted for an attempt to procure abortion on herself. In Scotland, however, while as in England it may be an offence

to attempt to steal where there is nothing to steal (*Lamont v. Strathearn*⁽⁶⁾) it has been held that a woman must be pregnant before the crime of attempting to procure abortion can be committed (*Peggy Anderson*⁽⁷⁾; and *Semple*⁽⁸⁾).

In Scotland, procuring abortion is a crime at Common Law and not a statutory offence. Nevertheless I find in these Scots cases support for the view I have taken in the present case. In *Peggy Anderson* Lord Anderson said:—

"In a charge of procuring or attempting to procure abortion . . . the prosecutor must libel, and, to secure a conviction, must prove that the patient was pregnant. This proposition seems to be made good by consideration of what is involved in the crime, and by having regard to the presumptive reasons whereby the acts resulting in abortion are regarded as criminal. Abortion, in the sense of the criminal law, is held to be criminal because its successful accomplishment results in the destruction of potential human life."

In the later case of *Lamont*, Lord Sands referred to the case of *Peggy Anderson*⁽⁷⁾ and dealt with the distinction between attempting to procure the abortion of a woman not pregnant and attempting to steal from a pocket which has nothing in it in the following passage:—

"A charge of attempt at criminal abortion is a charge of an attempt to make a pregnant woman abort. A charge of an attempt to steal is a charge of attempting to steal anything of value that might be found. The completed acts may be on the same footing. One cannot cause abortion if the womb be empty or steal a valuable if the pocket is empty. But the attempts may be on a different footing. As regards abortion I understand that the view taken was that attempt to commit abortion must be an attempt to cause a pregnant woman to abort. A pregnant woman is a condition of the offence. On the other hand, in the case of attempted theft from a pocket, that is an attempt to steal whatever may be found there. A pocket which *may* contain something of value is the only condition."

For the foregoing reasons I would have allowed the appeal.

Whyatt C.J. (S):—The question for decision in this reference is whether a person can be convicted of an attempt to cause a woman to have a miscarriage if the woman is not pregnant at the time the attempt is made. The President of the Sessions Court thought that a conviction could be recorded in such circumstances; the learned Judge, on appeal, held otherwise, but certified that the point was one which should be determined by the Court of Appeal.

If this question depended solely upon the laws of logic, there would be much to be said

A for the view that a person cannot attempt to commit an offence if the offence itself cannot be committed but it is in the provisions of the Penal Code and in the judicial decisions interpreting those provisions, rather than in simple logic, that the answer is to be found. The relevant provisions of the Penal Code read as follows:

B "Section 312. Whoever voluntarily causes a woman with child to miscarry shall . . . be punished with imprisonment . . . which may extend to three years . . . ; and if the woman be quick with child, shall be punished with imprisonment . . . which may extend to seven years....."

C Section 511. Whoever attempts to commit an offence punishable by this Code . . . and in such attempt does any act towards the commission of such offence shall . . . be punished with such punishment as is provided for the offence . . . ; provided that any . . . imprisonment imposed shall not exceed one-half of the longest term provided for the offence.

ILLUSTRATIONS.

- (a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft and therefore is guilty under this section.
- (b) A makes an attempt to pick the pocket of Z by thrusting his hand in Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket; A is guilty under this section."

It appears to me that the analogy between the two illustrations, in particular Illustration (b), and the present case is exact for if it be an offence to thrust a hand into a person's pocket with intent to steal, notwithstanding that the pocket is empty, it is equally an offence, in my view, to insert an instrument into a vagina with intent to cause a miscarriage, notwithstanding that the uterus is empty. Moreover the Courts in India, construing precisely similar provisions in the Indian Penal Code, have interpreted them in this wide sense. As long ago as 1887, in the case of the *Queen Empress v. Jiva'ji*⁽⁴⁾, Birdwood J. said: "No doubt an attempt, within the meaning of section 511 of the Indian Penal Code, is possible, even when the offence attempted cannot be committed; as when a person, intending to pick another person's pocket, thrust his hand into the pocket but finds it empty. That such an act would amount to a criminal attempt, appears from the illustration to section 511. But in doing such an act, the offender's intention is to commit a complete offence and his act only falls short of the offence by reason of an accidental circumstance which has prevented the

completion of the offence." So in the present case, the offender's intention was to commit the complete offence of causing a woman to have a miscarriage but her act fell short of the offence by reason of the accidental circumstance that the woman was not pregnant. This interpretation of the Illustration to section 511 was endorsed as recently as 1933, in the case of *Asgaralli Pradhanin v. Emperor*⁽⁹⁾ where Lord-Williams J., after referring to the Illustration (b), said: "He tries to steal but is frustrated by a fact, namely the emptiness of this pocket, which is not in any way due to any act or omission on his part." The same may be said of the accused in the present case: she tried to cause a woman to have a miscarriage but she was frustrated by a fact, namely, the emptiness of the uterus, which was not in any way due to any act or omission on her part.

I would add that the case of *Asgaralli Pradhanin v. Emperor*, *supra* is also of importance since it removes any doubt (if indeed there is room for doubt) that section 511 and the Illustrations are general in their application and apply to an attempt to cause a miscarriage under section 312. It is true that Lord-Williams J. held in that case that there was no attempt to cause miscarriage because the drug which was administered was harmless but it is implicit throughout the judgment that section 511 and the principles embodied in the Illustrations are wide enough to cover a case where an act is done towards the commission of an offence against section 312, notwithstanding that the complete offence cannot be committed by reason of some fact unknown to and independent of the person who seeks to commit the offence.

The argument based upon the construction of section 511 of the Penal Code and the Illustrations to that section, is, in my opinion, sufficient to dispose of this case but out of deference to the arguments addressed to the Court on the English cases, I will make a brief reference to this aspect of the subject. The English law as it exists today is concisely summarised in Volume 10 of *Halsbury* (Simonds Edition) at page 308 in the following terms: "a person may be guilty of an attempt to commit an offence though that offence could not, in the circumstances, have been committed." But this was not always so. In 1864, in the case of *R. v. Collins*⁽²⁾, a prisoner was indicted for attempting to commit felony by putting his hand into a

A woman's pocket with intent to steal the property in the pocket but as there was no proof that there was anything in the pocket, it was held that the prisoner could not be convicted of the attempt. In 1892 this case was considered in *Reg. v. Ring & Ors.*⁽¹⁾. In that case the prisoners were charged with attempting to steal from a person unknown and the evidence established that they hustled a woman boarding a train and tried to find her pocket but it was not proved that there was anything in the pocket. It was argued on behalf of the prisoners, on the authority of *Reg. v. Collins*, *supra*, that there was no case against them but Lord Coleridge C.J. said: "This case was stated to ascertain whether or not *Reg. v. Collins* is good law. That case was overruled by *Reg. v. Brown*⁽¹⁰⁾, a case decided by five judges, and since this case will also be decided by five judges, one of whom was one of the judges who decided *Reg. v. Brown*, the learned Judge who stated the case will have the satisfaction of knowing that now nine judges hold that *Reg. v. Collins* is bad law". There is, therefore, no doubt that the English law now is that a person may be guilty of an attempt to commit an offence even though the commission of the full offence may be impossible.

It should, however, be remembered that the principle does not apply where there is an express statutory provision dealing with an attempt to commit an offence; in such cases, of course, the question whether an attempt had been made so as to constitute an offence depends upon the wording of the statute. An example of such a case is provided by *R. v. Scudder*⁽¹¹⁾ where a prisoner was acquitted on an indictment for administering a drug to a woman to procure an abortion, the woman not being with child at all although the prisoner thought she was, because the Court held that on the true construction of section 2 of the Statute of George III under which the charge was brought, it was necessary, in order to constitute the offence, that the woman should be with child. Perhaps a more striking example of the effect of special statutory provisions in cases of this kind is provided by the case of *Reg. v. Whitchurch*⁽⁵⁾. In that case a charge was preferred under section 58 of the Offences against the Person Act 1861, which expressly provides that if a woman administers drugs to herself with intent to procure her miscarriage, it is a crime only in the event of the woman being with child, whereas if other persons administer drugs to a woman

with intent to procure miscarriage, the act is criminal, whether the woman is with child or not. The Court held that although, under that section, a woman could not be convicted of procuring her own abortion, if she was not with child, she could nevertheless be convicted of conspiring with others to procure abortion on herself, since in the case of the others it was an offence to administer drugs with intent to procure miscarriage, whether the woman be or be not with child. This case, therefore, turned upon the special wording of section 2 of the Offences against the Person Act 1861, and does not establish any general principle.

The position under English law, therefore, appears to be that a person can be convicted of an attempt to commit an offence even though the commission of the full offence is impossible but that there are certain statutory encroachments on this principle as exemplified in the two cases cited above. The foregoing is, I think, a sufficient review of the English cases cited to the Court in the course of argument. They are no doubt of interest but they are not, strictly speaking, *ad rem*. The question to be decided in this reference depends in my view, not upon the English cases, but upon the interpretation to be placed on sections 312 and 511 of the Penal Code and the Illustrations thereto, such interpretation being assisted by the decisions of the courts of India on precisely similar provisions of the Indian Penal Code. For the reasons given earlier in this judgment I am of the opinion that section 511 and the principles embodied in the Illustrations apply to the present case and I would, therefore, answer the question referred to this Court by stating that, in my view, in a charge of attempting to cause a woman to have a miscarriage it is not necessary for the Court to be satisfied that the woman is with child before the Court proceeds to convict.

Good J.:—In this case the accused was charged in the Sessions Court, Ipoh, as follows:

"That you on 19.10.56 at about 3.00 p.m. at No. J. 60, Lorong Silibin, Ipoh, in the State of Perak voluntarily caused one female Chinese named Chee Yew Cheng then being with child to miscarry, such miscarriage not being caused by you in good faith for the purpose of saving the life of the said Chee Yew Cheng, and thereby committed an offence punishable under section 312 of Penal Code."

At the end of the prosecution case, the learned President not being satisfied that it had been established that the complainant was pregnant

A and had had a miscarriage, altered the charge to the following:

"That you on or about 19.10.56 at No. J. 60, Lorong Silibin, Ipoh, voluntarily attempted to cause one Chee Yew Cheng to have a miscarriage and in such attempt did an act to wit inserting an instrument into her vagina and thereby committed an offence punishable under section 312 and section 511 Penal Code."

B On that charge he convicted the accused and sentenced her to three months' imprisonment. She appealed and the learned Judge allowed the appeal on grounds which he stated as follows:

C "In my view, whilst on a charge of an attempt to commit an offence the prosecution is not required to prove the fact of the abortion, it is nevertheless still necessary to prove, that is to say, to lead evidence from which it may properly be inferred that the woman was with child. In this task the prosecution, in the estimation of the learned President, had signally failed. That, in my view, disposes of the matter, and I can only conclude that the amendment of the charge might have been due to a misapprehension viz. the misapprehension that it would not be necessary to prove these facts in order to support the charge as amended.

D My conclusion, therefore, is that the appellant was wrongly convicted and her appeal must be allowed."

E Subsequently, however, he decided to refer to this Court under section 34 of the Courts Ordinance, 1948, the following point of law:

"Whether in a charge of attempting to cause a woman to have a miscarriage contrary to sections 312 and 511 of the Penal Code it is necessary for the Court to be satisfied that the woman is with child before the Court proceeds to convict."

F Section 312 of the Penal Code provides as follows:

G "Whoever voluntarily causes a woman with child to miscarry shall, if such miscarriage be not caused in good faith for the purpose of saving the life of the woman, be punished with imprisonment of either description for a term which may extend to three years, or with fine, or with both; and if the woman be quick with child, shall be punished with imprisonment of either description for a term which may extend to seven years, and shall also be liable to fine."

H Section 511 deals with attempts to commit offences in the following terms:

I "Whoever attempts to commit an offence punishable by this Code or by any other written law with penal servitude or imprisonment or fine or with a combination of such punishments, or attempts to cause such an offence to be committed, and in such attempt does any act towards the commission of such offence, shall, where no express provision is made by this Code or by such other written law, as the case may be, for the punishment of such attempt, be punished with such punishment as is provided for the offence: Provided that any term of penal servitude or imprisonment imposed shall not exceed one-half of the longest term provided for the offence."

The illustrations to section 511 are important and I think it necessary to set them out —

"(a) A makes an attempt to steal some jewels by breaking open a box, and finds after so opening the box that there is no jewel in it. He has done an act towards the commission of theft, and therefore is guilty under this section.

(b) A makes an attempt to pick the pocket of Z by thrusting his hand into Z's pocket. A fails in the attempt in consequence of Z's having nothing in his pocket; A is guilty under this section."

It is perhaps unfortunate that both these illustrations deal with cases of attempted theft, but I see no reason for supposing that the principle which they set out is related to the effence of attempted theft alone. If this was so, they would be *ad hoc* illustrations and useless as statements of principle. In my view, they must be construed as being of general application although the examples chosen happened to be examples of cases of attempted theft.

The question was considered in England in the case of *Reg. v. Collins & Ors.*⁽²⁾. In that case, one of the prisoners was proved to have put his hand into the gown pocket of a lady but it was not proved that there was any property in the pocket at the time. The evidence showed that the other prisoners were concerned in the transaction. On a charge of attempted theft they were found guilty by the jury but the Judge stated a case for the opinion of the Court of Criminal Appeal. The Appellate Court quashed the conviction and it is necessary to set out the judgment of Cockburn, C.J., which gives the reasons for this decision.

"We are all of opinion that this conviction cannot be sustained, and in so holding it is necessary to observe that the judgment proceeds on the assumption that the question, whether there was anything in the pocket of the prosecutrix which might have been the subject of larceny, does not appear to have been left to the jury. The case was reserved for the opinion of this Court on the question, whether, supposing a person to put his hand into the pocket of another for the purpose of larceny, there being at the time nothing in the pocket, that is an attempt to commit larceny? We are far from saying that, if the question, whether there was anything in the pocket of the prosecutrix had been left to the jury, there was no evidence on which they might have found that there was, and in which case the conviction would have been affirmed. But, assuming that there was nothing in the pocket of the prosecutrix, the charge of attempting to commit larceny cannot be sustained. This case is governed by that of *Reg. v. M'Pherson*, and we think that an attempt to commit a felony, can only be made out when, if an interruption had taken place, the attempt could have been carried out successfully, and the felony completed of the attempt to commit

which the party is charged. In this case, if there was nothing in the pocket of the prosecutrix, in our opinion the attempt to commit larceny cannot be established. It may be illustrated by the case of a person going into a room, the door of which he finds open, for the purpose of stealing whatever property he may find there, and finding nothing in the room, in that case no larceny could be committed, and therefore no attempt to commit larceny could be committed. In the absence, therefore, of any finding by the jury in this case, either directly, or inferentially by their verdict, that there was any property in the pocket of the prosecutrix, we think that this conviction must be quashed."

That case was heard in 1864. In 1892 in the case of *Reg. v. Ring & Ors.*⁽¹⁾ on virtually identical facts, five judges held that *Reg. v. Collins & Ors.*, *supra* was bad law.

In an Indian case in 1887 *Queen Empress v. Mangesh Jiva'ji*⁽⁴⁾, the accused was convicted of an attempt to commit criminal intimidation under the following circumstances. The accused had been for some time employed as a clerk in the Forest Department, but was dismissed by the Divisional Forest Officer, Mr. MacGregor, for neglect of duty. He applied to be reinstated, but Mr. MacGregor refused. Thereupon the accused fabricated a petition, purporting to be written by the inhabitants of certain villages, and sent it by post to the Revenue Commissioner, Southern Division. The petition contained, among other things, a threat that, unless Mr. MacGregor were transferred to some other district, he would be killed. The appellate Court reversed the conviction and sentence for reasons which appear from the following passage from the judgment of Birdwood, J.:

"No doubt, an attempt, within the meaning of section 511 of the Indian Penal Code (Act XLV of 1860), is possible, even when the offence attempted cannot be committed; as when a person, intending to pick another person's pocket, thrusts his hand into the pocket, but finds it empty. That such an act would amount to a criminal attempt, appears from the illustrations to section 511. But in doing such an act, the offender's intention is to commit a complete offence, and his act only falls short of the offence by reason of an accidental circumstance which has prevented the completion of the offence. In the present case, it cannot be said that the accused intended to do more than he actually did. He intended to send a fabricated petition to the Commissioner, containing a threat directed against Mr. MacGregor. And that intention, — assuming the facts to be as found by the Sessions Judge, — he carried out completely. If, therefore, he committed an offence at all, he committed the offence which he intended to commit; — not an attempt, but the offence attempted. The Sessions Judge has, however, found that the offence attempted was not, as a matter of fact and law, committed, because the person to whom the petition was sent by the accused was not himself threatened, and was

not "interested" in the person threatened. It appears, therefore, that the act intended and done by the accused lacked an essential element of the offence of committing criminal intimidation as defined in section 503 of the Indian Penal Code (Act XLV of 1860). But it does not follow that the accused could still be legally convicted of an attempt to commit that offence. It is possible to attempt to commit an impossible theft, and so offend against the Code, because theft is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code. But no criminal liability can be incurred under the Code by an attempt to do an act, which, if done, would not be an offence against the Code. In the present case, therefore, if the accused was not guilty of committing criminal intimidation, because the act intended and done by him lacked an ingredient of that offence, he could not be guilty of the attempt of which he has been convicted."

For the purposes of the present case, I think it is important to emphasise the words: "It is possible to attempt to commit an impossible theft, and so offend against the Code, because theft is itself an offence against the Code, and may, therefore, be attempted within the meaning of the Code." On the analogy of this proposition, with which I am respectfully in complete agreement, it seems to me to be possible to attempt to cause an impossible miscarriage and still offend against the Code because the voluntary causing of a miscarriage is itself an offence against the Code and may, therefore, be attempted within the meaning of the Code.

The vital operative words of section 511 in my view are the words: "and in such attempt does any act towards the commission of such offence." In *Queen Empress v. Luzman Naryan Joshi*⁽¹²⁾, Sir Lawrence Jenkins, C.J., defined "attempt" as "an intentional preparatory action which failed in its object through circumstances independent of the person who seeks its accomplishment." And the same Judge in *Queen Empress v. Vinayek Narayen Bhatye*⁽¹³⁾ defined "attempt" as "when a man does an intentional act with a view to attain a certain end, and fails in his object through some circumstance independent of his own will." These two definitions were referred to by Lord-Williams, J., in his judgment in *Asgaralli Pradhanin v. Emperor*⁽⁹⁾. In *Asgaralli's* case, which was concerned with a charge of attempting to cause a miscarriage, the accused was proved to have attempted to administer to the complainant two chemicals, a liquid and a powder, for the purpose of procuring a miscarriage but there was no evidence to show that either of the chemicals was capable of operating as an abortifacient; and on appeal against conviction, the appellate Court held that

A on the facts the appellant could not be convicted of an attempt to cause a miscarriage because what he did was not an "act done towards the commission of the offence" of causing miscarriage.

B "Neither the liquid nor the powder being harmful, they could not have caused a miscarriage. The appellant's failure was not due to a factor independent of himself."

C In the present case, the circumstances are different. The evidence clearly showed that it was the intention of the appellant to bring about a miscarriage and she could not have made the attempt unless she believed the complainant to be pregnant. If the complainant was not pregnant, then the failure of the attempt was due to a factor independent of the appellant herself. Her attempt was prevented or frustrated by the non-existence of a circumstance which she D believed to exist. As I see it, she is in exactly the same position as the would-be pick-pocket who, believing that there is or may be something capable of being stolen in the pocket which he decides to pick, attempts to steal it and finds his attempt foiled by a circumstance independent of himself, namely, the non-existence of anything E capable of being stolen. The circumstances of the present case seem to me to be exactly covered by the illustrations to section 511 of the Penal Code, even though these illustrations speak of attempts to commit a different type of offence. F I would, therefore, answer the question referred to us for determination by the learned appellate Judge in the negative and would affirm the conviction and sentence of the lower Court.

Appeal dismissed.

G

M.M.P. SAMINATHAN & ORS. v. REG.

[A. Cr. J. (Chua J.) September 26, 1957]

[Singapore — Magistrate's Appeals Nos. 148, 149 and 150 of 1957]

H

Local Authority — Municipal Ordinance (Cap.133 of 1936 Edn.), s.194(4)(a) — "Food" — Meaning of — Whether raw meat, raw vegetables and live poultry are "food" within the meaning of s.194(4)(a) of the Municipal Ordinance.

I

The term "food" in section 194(4)(a) of the Municipal Ordinance means any article used as food for human consumption. Meat and vegetables are food in that they are nutritive, therefore raw meat and raw vegetables are "food" within the meaning of that section, but not live poultry. Poultry becomes "food" when it has been killed.